Supreme Court, U.S.
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No. 94-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

DAVID A. WILLIS,

Petitioner,

v.

JAMES E. AIKEN, Commissioner,
Indiana Department of Corrections,
PORTER SUPERIOR COURT and
LINLEY E. PEARSON, Attorney
General of Indiana,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

In the
United States Court of Appeals
For the Seventh Circuit

No. 92-1098

DAVID A. WILLIS,

Petitioner-Appellant,

v.

JAMES E. AIKEN, Commissioner,
Indiana Department of Corrections,
PORTER SUPERIOR COURT and
LINLEY E. PEARSON, Attorney General
of Indiana,

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Indiana, Hammond Division.
No. 91 C 147—Rudy Lozano, *Judge.*

ARGUED SEPTEMBER 29, 1992—DECIDED OCTOBER 29, 1993

Before RIPPLE and KANNE, *Circuit Judges*, and LEINENWEBER, *District Judge.**

RIPPLE, *Circuit Judge.* The petitioner, David Willis, seeks federal habeas relief from a conviction entered by an Indiana state court. Mr. Willis submits that his right to

* The Honorable Harry D. Leinenweber from the United States District Court for the Northern District of Illinois is sitting by designation.

due process of law guaranteed by the Fourteenth Amendment has been violated because the state trial court gave an Indiana pattern jury instruction that states, in part, that "the jury is both the judge of the law and of the facts." The district court dismissed the petition on procedural grounds before reaching the merits. For the reasons that follow, we affirm the judgment of the district court.

I

BACKGROUND

In August 1981, attorney David Willis was employed by Carol Durkin to represent her three children in litigation over her deceased former husband's life insurance proceeds. As a result of Mr. Willis' representation, on November 19, 1984, checks were issued to Durkin's children, in the amount of $14,818.46 each. The checks were mailed to Mr. Willis for distribution. He also received a separate check for $4,527.86 to cover his attorney fees. On November 30, 1984, Mr. Willis printed Steve Staton's name (one of Durkin's children), as well as his own, on the check payable to Staton and deposited it into his client trust account. That same day, Mr. Willis transferred $811.54 from his general account into his client trust account, making a total deposit of $15,630 into his client trust account on November 30. Prior to these deposits, Mr. Willis' client trust account was overdrawn in the amount of $15.39. The next day, on December 1, Mr. Willis wrote a check from his client trust fund to satisfy a personal obligation in the amount of $15,594.16.[1]

[1] This obligation was the result of a plea agreement entered into between Mr. Willis and the State of Indiana on August 31, 1984. The plea agreement arose from a check deception charge filed against Mr. Willis on March 30, 1984. Under the agreement, the check deception charge would be dismissed if Mr. Willis made restitution within ninety days; otherwise he would be convicted of check deception and would be imprisoned for thirty days.

On February 18, 1985, before Mr. Willis contacted Durkin or any of her children to let them know that the lawsuit had been settled and that he had received the settlement checks, Staton appeared in Mr. Willis' office to retrieve his check. Mr. Willis gave Staton a check, drawn from his client trust account, for the sum of $14,818.46. After Staton deposited the check, it was returned to him due to insufficient funds. On April 8, 1985, after Staton had sent Mr. Willis a letter demanding payment, Staton received a cashier's check for $15,500. Subsequently, as a result of Mr. Willis' alleged misuse of client trust funds, the State of Indiana indicted him for theft.[2]

II

PRIOR PROCEEDINGS

A. *Direct Proceedings*

In 1987, an Indiana state trial court convicted Mr. Willis of theft. He was sentenced to two years' imprisonment. Mr. Willis appealed his conviction to the state appellate court and presented six issues. Specifically, he argued on direct review that the trial court erred by: (1) considering his status as a former attorney and failing to consider mitigating circumstances; (2) refusing to grant a mistrial based upon an alleged misstatement of the law made by the prosecutor during voir dire; (3) allowing testimony regarding a prior check deception charge and related complaints filed with the Indiana Supreme Court Disciplinary Board; (4) allowing expert testimony regarding an attorney's use of client trust accounts; (5) denying him a fair trial because law books and periodicals were left in areas accessible to the jury during its deliberations; and (6) denying him a fair trial because the trial judge refused to recuse himself after allegedly engaging in ex parte communications with opposing counsel. Mr. Willis did not challenge any of the jury instructions on direct appeal, nor

[2] Prior to trial, Mr. Willis resigned from the Indiana Bar.

had he objected to the instructions at trial. The state appellate court rejected all six of Mr. Willis' state law challenges. *Willis v. State (Willis I)*, 512 N.E.2d 871 (Ind. Ct. App. 1987). Mr. Willis then petitioned the Supreme Court of Indiana, but was denied review without opinion in December 1987.

B. *State Postconviction Proceedings*

Thereafter, in 1988, Mr. Willis filed a petition for habeas corpus with the state court, seeking postconviction relief. In his postconviction challenge, Mr. Willis argued, for the first time, that the trial court had committed reversible error by instructing the jurors as follows:

> Since this is a criminal case the Constitution of the State of Indiana makes you the judge of both the law and the facts. Though this means that you are to determine the law for yourself, it does not mean that you have the right to make, repeal, disregard, or ignore the law as it exists. The instructions of the court are the best source as to the law applicable to this case.

Mem. Op. at 14. Specifically, Mr. Willis argued that giving the pattern jury instruction violated his due process rights because the instruction informed the jurors that they could ignore the law either by not requiring that the prosecution prove intent or by shifting the burden of proof from the prosecution to the defense. However, Mr. Willis' failure to raise this issue during his trial violated Indiana's "contemporaneous objection" rule, effectively waiving further review of the issue. Nonetheless, in Indiana, when a trial court commits a "fundamental error," a court may still grant relief despite waiver of the issue. *Wilson v. State*, 514 N.E.2d 282, 284 (Ind. 1987). Therefore, Mr. Willis also argued that a "fundamental error" was committed in giving the instruction. The state post-

conviction trial court granted Mr. Willis relief and the State and Mr. Willis both appealed.[3]

In April 1990, the Indiana appellate court reversed the state trial court. *State v. Willis (Willis II)*, 552 N.E.2d 512 (Ind. Ct. App. 1990). In reversing the judgment of the postconviction trial court, the appellate court expressed the view that the instruction had not violated Mr. Willis' due process rights. However, in the course of its opinion, the court did not expressly refer to either the due process guarantee of the Indiana Constitution or the due process guarantee of the Fourteenth Amendment of the Federal Constitution. Indeed, the only explicit reference to either constitution in the three-page opinion is a brief passage noting that article I, section 19 of the Indiana Constitution states that:

> In all criminal cases whatever, the jury shall have the right to determine the law and the facts.

Willis II, 552 N.E.2d at 515. The relevant portion of the opinion cites two Indiana court cases. No federal cases are cited. The Indiana court characterized the instruction at issue as an added protection for the defendant:

> From a practical viewpoint, the trial court determines the law in all procedural matters, and during the trial when the jury participates in the criminal judicial process, it is the trial court judge who determines the law as to the admissibility of evidence, motions for direct acquittal, mistrial, and the granting of a new trial.

Id. Mr. Willis appealed the decision to the Supreme Court of Indiana, but further review was denied.

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[3] Mr. Willis appealed the court's denial of relief on issues that are not now before us. For clarity, we shall not discuss those issues here.

C. *Federal Habeas Proceedings*

Mr. Willis next filed a petition for a writ of habeas corpus in federal district court. He alleged that the state conviction had been obtained in violation of his federal constitutional right to due process as guaranteed by the Fourteenth Amendment. The district court held that, absent a showing of cause and prejudice, it did not have jurisdiction to address Mr. Willis' postconviction challenge to the instruction because

> [t]he [Indiana] appellate court reached this determination by way of an analysis of the Indiana Constitution and Indiana case law. Thus, the state court grounds cannot fairly be read to invoke or be intertwined with federal law. Moreover, the grounds relied upon by the appellate court were consistently applied and justified the decision rendered. Accordingly, the state grounds are adequate and independent, precluding federal habeas review absent a showing of cause and prejudice. . . . Willis can show no cause or prejudice for his procedural default.

Mem. Op. at 15. Although Mr. Willis raised several issues in the district court, only his challenge to the instruction informing the jury that it was the judge of both law and fact has been raised on appeal to this court and we shall limit our discussion accordingly.

III

ANALYSIS

A. *Independent and Adequate State Ground*

1.

In general, federal courts cannot review on petition for writ of habeas corpus questions of federal law that have not been properly presented to the state court. Under this principle, if a state court did not reach a federal issue because it applied, evenhandedly, a state procedural rule, the matter is closed to the federal habeas court absent

a showing of cause and prejudice. *Wainwright v. Sykes*, 433 U.S. 72, 90-91 (1977).

Indiana has a procedural rule requiring that an objection to a jury instruction be made in the trial court in order to preserve the issue for appeal. Absent such an objection, the issue is waived and further review is barred. When, under this contemporaneous rule, the state court declines to review an issue not properly preserved, the state court decision rests upon a state law ground that is both "independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 111 S. Ct. 2546, 2553-54 (1991). In such a situation, a subsequent ruling on the substantive federal question by the United States district court is precluded. Otherwise, the decision would be merely advisory because, regardless of the decision by the district court, the state disposition would stand; it rests on an independent and adequate state law ground. *Id.* at 2554.[4] The independent and adequate state law ground may be based either upon substantive state law or upon a violation of state procedural rules. *Harris v. Reed*, 489 U.S. 255, 261 (1989). For a state procedural ground to bar review, the state court actually must have relied upon the procedural bar as an independent basis for its disposition of the case.

The Supreme Court has recognized that it is not always clear from the face of a state court opinion whether the state court actually relied upon a state law ground or whether the state reached the merits of a federal claim. The Court first addressed this problem not in the context of habeas corpus, but with respect to its own direct

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[4] As we have already noted in the text, in *Wainwright v. Sykes*, 433 U.S. 72 (1977), the Supreme Court recognized a limited exception to this doctrine and held that even an independent and adequate state procedural ground may be reviewed by the federal courts if the petitioner can show "cause and prejudice" for the procedural default. *Id.* at 90-91. However, Mr. Willis has chosen not to present a cause and prejudice argument on appeal. Accordingly, he has waived the issue and we shall not discuss it further.

review of state court decisions. To avoid the federal judiciary's becoming enmeshed unnecessarily in state decisional law, the Court held that, unless a state opinion contains a "plain statement" that it relied upon an independent and adequate state law ground, a presumption arises that the federal claim was reached. *Michigan v. Long*, 463 U.S. 1032, 1042 (1983). Subsequently, as we shall discuss at length in the following paragraphs, the Court held that, as a general rule, this presumption also applies to federal review of state criminal judgments when they are challenged in habeas corpus proceedings. *See Harris*, 489 U.S. at 1043. In *Coleman*, the Court summarized this presumption:

> In habeas, if the decision of the last state court to which the petitioner presented his federal claims fairly appeared to rest primarily on resolution of those claims, or to be interwoven with those claims, and did not clearly and expressly rely on an independent and adequate state ground, a federal court may address the petition.

Coleman, 111 S. Ct. at 2557.

However, as we also shall discuss at greater length later, the Court in *Coleman* cautioned that, before the *Long-Harris* presumption is applicable, a federal court must first ascertain that the state court decision fairly appears to rest on federal grounds or is interwoven with federal law. Thus, even when the state court does not make a "clear and express" statement that it is deciding an issue based on state law, the presumption may not automatically apply: The federal court first must determine whether the state court decision fairly appears to rest on federal grounds. *Id.*

This case requires that we apply these general principles to a specific but recurring litigation problem that has not yet been the focus of Supreme Court guidance: when the state court addresses a federal constitutional issue but only to determine whether it ought to disregard its waiver rule on the ground that the federal constitutional issue

constitutes "fundamental error." In the following subsections, we shall examine this problem by making two inquiries. In the first, we shall put aside for the moment the specific context of waiver and "fundamental error." We shall determine, without reference to this complicating factor, whether it can be said that the Indiana court addressed the underlying substantive issue on federal constitutional grounds. In the second inquiry, we shall determine the impact of this factor on whether the state decision can be said to rest on an adequate and independent state law ground.

2.

We begin our analysis by examining the opinion of the Indiana appellate court to determine whether, without regard to the "fundamental error" dimension of the problem, it can be said that the court addressed the substantive issue in federal constitutional terms, given the mandates of *Harris* and *Coleman*. The state intermediate appellate court chose to cast the issue in the following terms:

> Willis contends that the instruction given by the trial court which informs the jury that it is the judge of the law as well as of fact denied him basic constitutional rights and due process.

Willis II, 552 N.E.2d at 514. The court then proceeded to discuss the appellant's submission by invoking the concept of "due process" without expressly identifying the terms as grounded in either the state or Federal Constitution. This ambiguity ought to suffice to invoke the presumption of *Harris*. There are, however, several other aspects of the state court opinion that make it even more reasonable to conclude that the Indiana court's decision "fairly appears to rest on federal grounds." *Coleman*, 111 S. Ct. at 2557. The instruction at issue is, as the Indiana court pointedly acknowledged, grounded in a provision of the Indiana Constitution. It would indeed be unusual for the appellant to argue, or for the state court to assume, that one part of the state constitution might be rendered

"unconstitutional" by another section of the same document. It is far more reasonable to assume that the Indiana court understood that, under Article VI of the Federal Constitution, any interpretation of a state's due process provision must be in conformity with the Federal Constitution. Any holding that a provision of the state constitution does not deny due process must necessarily include a determination that the state constitutional provision is not violative of the Federal Constitution.

We conclude, therefore, that *when considered without respect to the issue of waiver and "fundamental error,"* the opinion of the Indiana appellate court deals with the substantive issue of the contested jury instruction in terms of the Federal Constitution. That procedural context cannot, however, be ignored. We now turn to a consideration of the impact of that procedural context on the issue of whether the Indiana court's decision rests on an adequate and independent state law ground.

3.

The Indiana postconviction appellate court addressed federal constitutional concerns in analyzing the appropriateness of the jury instruction. As we have just noted, however, it did so in the context of determining whether waiver of the issue through failure to object ought to be forgiven because the instruction constituted "fundamental error." We must now determine whether, in this procedural context, the Indiana appellate court's judgment can be said to rest on an independent and adequate state law ground or whether the determination of "no fundamental error" is so "interwoven," *Coleman*, 111 S. Ct. at 2557, with the federal claim as to justify federal review without a demonstration of cause and prejudice.

We have confronted the problem before. As the Supreme Court has refined the general principles of law governing the doctrine of independent and adequate state law ground, we have addressed this particular aspect of the doctrine in light of that guidance. Today, we continue our

attempt to follow a path that the Supreme Court has cut only partially and where future directions are only dimly illumined by current precedent. This court first confronted this problem in a case decided prior to the Supreme Court's decision in *Harris*. *See Phillips v. Lane*, 787 F.2d 208 (7th Cir.), *cert. denied*, 479 U.S. 873 (1986). In *Phillips*, the state trial court had failed to instruct the jury with respect to the burden of proof on the issue of insanity at a hearing on the defendant's fitness to stand trial. On direct appeal, the Illinois state court held that the issue had been waived for failure to object at trial. The state appellate court then proceeded to consider whether this failure to instruct on the burden of proof was plain error. The court addressed the merits of the issue and ruled that the state had met its burden under the appropriate standard.

In determining whether further review of the substantive issue was permitted in a federal habeas proceeding or whether the state court judgment rested on an independent and adequate state law ground, we noted that, read literally, the decision of the Illinois court appeared to acknowledge that the defendant had a right to a determination as to whether there was plain error and to reversal if the court determined that any such error existed. However, after extended analysis, we determined that the Illinois plain error rule had no such mandatory characteristic. Rather, its invocation was a matter of grace and therefore permissive. *Id.* We noted that the Illinois plain error doctrine involved an assessment of whether the defendant had suffered any prejudice in the particular case and that therefore the "domain of the rule is limited to cases where the facts are so closely balanced that the error might have made a difference in outcome." *Id.* We therefore concluded that the Illinois courts had not intended to craft a *mandatory* plain error doctrine, except perhaps in the case of the error that produced a gross miscarriage of justice. We also noted the impact of a contrary rule on the law of habeas corpus:

> If the existence of the plain error rule entitled a defendant to obtain review in a federal habeas corpus proceeding of plain error whatever procedural defaults he may have committed, the domain of *Wainwright v. Sykes* would shrink to a small area. A defendant would always have the right to ask the federal court to set aside his state conviction for plain constitutional error, even if he had failed to make timely objection in the state court.

787 F.2d at 213. Consequently, we concluded that the state judgment rested on two adequate and independent grounds—the failure to make a contemporaneous objection and the lack of any error with respect to the instructions on the burden of proof. We did not have the power to review the first ground, and we could not reach the second because any relief would leave untouched the first, and independently adequate, ground for decision. *Id.* at 214.

After the Supreme Court decided *Harris* and extended the "plain statement rule" of *Long* to habeas corpus cases, this court was again faced with a situation quite similar to the one in *Phillips*. In *Rogers-Bey v. Lane*, 896 F.2d 279 (7th Cir.), *cert. denied*, 498 U.S. 831 (1990), we were confronted with a case in which the defendant, Rogers-Bey, had been convicted at a state trial in which there had been no contemporaneous objection to the admission of hearsay evidence. On appeal, the Illinois appellate court held that Rogers-Bey had waived the issue. As required by Illinois law, the state appellate court additionally considered whether or not the admission of the hearsay evidence amounted to plain error. It concluded that Rogers-Bey's claim did not rise to the level of plain error because the probability of conviction remained substantial. *Id.* at 281. The court, however, did not make a plain statement that it was relying on the procedural default in making this assessment and denying the petitioner relief.

After the district court denied habeas relief, the case came to this court. We held:

> By reaching the plain error claim after having found waiver, the court necessarily relied on two different grounds for its decision. The court gave no indication whether these grounds were independent and gave no limiting language regarding its reasons for reaching both grounds.

Id. In light of the *Harris* pronouncement that a plain statement is required to rebut the presumption that a state court relied on federal law, we held that the district court should consider the substantive merits of Rogers-Bey's habeas petition. In reaching this conclusion, we recognized that the *Harris* plain statement rule was created for the purpose of allowing the federal judiciary to determine easily the ground upon which the state court actually had relied. We pointed out that *Phillips* had devoted a great deal of time in attempting to determine the scope of Illinois' plain error doctrine and how it had been applied to the facts of a particular case:

> *Phillips*, which preceded *Harris*, was an attempt to divine the unstated, underlying intent of the Illinois courts in reaching the plain error analysis after finding waiver in precisely the cases such as where the intent was left implicit. The Supreme Court has directed that we no longer undertake such attempts. Under *Harris*, the state court must say whether it is relying on the state procedural bar as an independent ground. We no longer second guess the state court's intentions—the language must be clear. . . . While we realize the formalism inherent in requiring a plain statement by the state court, the Supreme Court required such a statement to relieve us of the burden of undertaking the difficult inquiry . . . into the unapparent intent of state courts.

Rogers-Bey, 896 F.2d at 282. In short, we concluded that "the impact of *Harris* on *Sykes* is that the state's reliance on the procedural foreclosure must be stated, and it must be stated in plain language." *Id.* We also noted that this approach brought with it a "formalism," but concluded

that formalism was necessary "to relieve us of the burden of undertaking the difficult inquiry . . . into the unapparent intent of state courts." *Id.*

Just as the *Rogers-Bey* court had to refine this circuit's law in light of the intervening Supreme Court decision in *Harris*, we must now reassess the situation in light of the most recent pronouncement of the Court in *Coleman*. At this point, we must focus on an aspect of *Coleman* other than the one that occupied us earlier in the analysis. Coleman argued that the Supreme Court of Virginia had applied the state procedural bar regarding time for appeal only after it had decided that the application of the bar to Coleman would not deprive him of a constitutional right. He relied on the Court's earlier decision in *Ake v. Oklahoma*, 470 U.S. 68 (1985). In that case, the Court was faced with a challenge to its own jurisdiction on direct appeal. Ake, a capital murder defendant, argued, on federal constitutional grounds, that he should have been provided with the services of a court-appointed psychiatrist. The state court addressed the claim on the merits, but then held that the defendant had waived the issue by failing to renew it in his motion for a new trial. In its brief before the Supreme Court of the United States, the State of Oklahoma submitted that the issue was not properly before the Court because the state court's decision rested on the adequate and independent state law ground of waiver for failure to comply with the state procedural requirement that the issue be presented at the motion for new trial. The Supreme Court rejected this contention. It determined that Oklahoma's waiver rule did not apply to fundamental trial error and that, under Oklahoma law, federal constitutional errors are considered "fundamental." Thus the state had made the invocation of the procedural bar depend on the resolution of the federal constitutional question. Therefore, held the Court, the invocation of the procedural rule is not independent of the federal constitutional ruling. *Id.* at 75.

In rejecting the application of *Ake* to *Coleman*, the Supreme Court ultimately noted that *Ake* was not applicable

because, under Virginia law, the state supreme court would only have granted the time extension if it had determined that the denial of the time extension itself would have abridged a constitutional right. *Coleman*, 111 S. Ct. at 2560. It would not have examined, as Coleman had contended, the underlying federal constitutional argument. Moreover, the Court wrote:

> *Ake* was a direct review case. We have never applied its rule regarding independent state grounds in federal habeas. But even if *Ake* applies here, it does Coleman no good because the Virginia Supreme Court relied on an independent state procedural rule.

Id.

This statement by the Supreme Court of the United States cannot be ignored by a lower federal court, bound not only by the letter but by the spirit of the doctrines of stare decisis and precedent. While the statement is technically dicta, it nevertheless raises a significant question as to whether there is absolute symmetry between *Long* and *Harris*. The Court in *Harris* said that, in adopting the plain statement rule for habeas corpus as it had in *Long* for its own jurisdiction over state cases, it was faced "with a common problem" and therefore was adopting "a common solution." *Harris*, 489 U.S. at 1043. The above noted language in *Coleman* suggests, however, that it is an open question as to whether the invocation of fundamental error, or similar exception, to mitigate the effect of a state waiver rule always will suffice to avoid the strictures of *Wainwright v. Sykes*, 433 U.S. 72 (1977). The ultimate answer to this quandary can, of course, only be supplied by the Supreme Court. As *Coleman* suggests, the answer may be somewhat more nuanced than *Harris* suggested. For the present, however, we need only determine, on the basis of the available precedent, the appropriate solution to the particular situation before us. In this regard, another aspect of *Coleman*, encountered briefly at an earlier point in our analysis, provides a helpful guide.

In addition to summarizing the presumption of *Harris*, the Court in *Coleman* also cautioned that, before the *Harris* presumption is applicable, a court must first ascertain whether the state court decision fairly appears to rest on federal grounds or is interwoven with federal law. In short, *Coleman* admonished that conclusive presumptions such as the one in *Harris* ought to be employed only when the generalization upon which they are based is correct as an empirical matter:

> The *Long* and *Harris* presumption works because in the majority of cases in which a state court decision fairly appears to rest primarily on federal law or to be interwoven with such law, and the state does not plainly state that it is relying on an independent and adequate state ground, the state court decision did not in fact rest on an independent and adequate state ground. We accept errors in those small number of cases where there was nonetheless an independent and adequate state ground in exchange for a significant reduction in the costs of inquiry.

Coleman, 111 S. Ct. at 2558. The tradeoff is very different, continued the Court, when it does not appear that the state decision rested primarily on federal grounds. In such a situation, it simply is not true that the most reasonable explanation is that the state court decided the case on a federal ground. Therefore, held the Court, the presumption of *Harris* ought to apply only when "a federal court has good reason to question whether there is an independent and adequate state ground for decision." *Id.* at 2559.

The Court elaborated further on the practical impact of an overly rigid application of the presumption in *Harris*:

> A broad presumption would also put too great a burden on the state courts. It remains the duty of the federal courts . . . to determine the scope of the relevant state court judgment. We can establish a *per se* rule that eases the burden of inquiry on the fed-

> eral courts in those cases where there are few costs to doing so, but we have no power to tell state courts how they must write their opinions. We encourage state courts to express plainly . . . the grounds upon which [their] judgment[s] rest[ ], but we will not impose on state courts the responsibility for using particular language . . . .

Id.[5]

After *Coleman*, we believe that the formalism of which we spoke in *Rogers-Bey* is no longer the controlling factor. We also believe that, because it remains our duty "to determine the scope of the relevant state court judgment," *id.*, it is permissible for us to examine the caselaw of Indiana to determine the function that the fundamental

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[5] The admonition of *Coleman* is perhaps best understood in the factual background of the case. In *Coleman*, a defendant who had been convicted in a Virginia state court filed his notice of appeal one day late. On appeal, the defendant attempted to raise several federal constitutional claims that he had not presented to the trial court. The state appellate court did not reach the merits of his appeal. Instead, it determined that Coleman had procedurally defaulted his claims by failing to comply with the Virginia procedural rule that requires notice of appeal to be filed within thirty days of the entry of judgment. Subsequently, Coleman petitioned the Virginia state courts for habeas corpus relief; he again attempted to raise his federal constitutional claims. However, Coleman exhausted all of his state avenues for postconviction relief and no state court reached the merits of his constitutional claims because of his procedural default. No other argument of a colorable federal constitutional nature was ever presented. The Supreme Court of Virginia was probably unaware of Coleman's substantive contentions when it ruled on the state procedural default. *See O'Dell v. Thompson*, 112 S. Ct. 618, 619 (1991) (statement of Blackmun, J., respecting the denial of certiorari). Coleman then filed a federal habeas petition, again raising all of his constitutional claims. It was in this context that the Supreme Court declined to apply the presumption of Harris. There simply was no basis upon which to argue that the Virginia Supreme Court's procedural rule was based on federal grounds and therefore there was an adequate and independent state law ground.

error doctrine plays in its appellate process.[6] More precisely, we must determine whether its use can be said to amount to an expression of willingness on the part of the state to forgive an earlier procedural default and to rest its decision on the federal issue.

As the parties' submissions to us amply demonstrate, the caselaw dealing with the Indiana fundamental error doctrine is labyrinthine. It is clear, however, that, while it encompasses matters of federal constitutional law, it also involves state constitutional, statutory, and common law issues as well. Moreover, not all federal constitutional errors are deemed fundamental. *Wilson v. Indiana*, 514 N.E.2d 282, 284 (Ind. 1987). In determining whether an error is fundamental, the courts of the state have employed a variety of formulas. In *Wilson*, the Supreme Court of Indiana wrote:

> To survive the procedural requirements, the error must constitute a blatant violation of basic principles, the harm or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process.

Id. Several months before its decision in *Wilson*, the Court wrote that, in order to constitute fundamental error, the defendant must demonstrate that, "had a proper objection been made, the trial court would have had no choice but to sustain the objection." *Brockway v. Indiana*, 502 N.E.2d 105, 108 (Ind. 1987); *accord Reynolds v. Indiana*, 460 N.E.2d 506, 508 (Ind. 1984) ("the error must constitute a clearly blatant violation of the most basic and elementary principles, and the harm or potential for harm therefrom must be substantial and appear clearly and prospective-

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[6] As Chief Judge Baker wrote in *United States ex rel. Gibson v. McGinnis*, 773 F. Supp. 126, 131 (C.D. Ill. 1991):

> Before resolving any ambiguity in favor of federal review, the federal habeas court must first closely examine the state court opinion and the state's procedural rules in order to determine whether the state court which issued the ambiguous opinion intended to reach the merits of the federal claim.

ly"). These cases demonstrate that the principle of fundamental error in Indiana law involves an assessment not only of the substantive rights at stake but also of their impact on the particular trial. While there have been occasions in which Indiana courts have looked to a federal court's assessment of federal rights to "corroborate" its own assessment, *see Winston v. Indiana*, 332 N.E.2d 229, 233 (Ind. Ct. App. 1975), there is no discernible pattern of dependency on federal court assessment of a particular error as "fundamental." Rather, the term, as employed in the Indiana cases, appears to be a term of art employed on a fact-specific basis for the purpose of determining whether to excuse noncompliance with the requirement that a timely objection be made on the record. Indeed, *Winston* emphasizes how closely the fundamental error doctrine is tied to the state procedural rule requiring a proper objection. In that case, the Indiana appellate court noted that, when the error is one that rests solely within the responsibility of the trial judge "in his *sua sponte* obligations," 332 N.E.2d at 233, the policy concerns against the invocation of the fundamental error doctrine are less weighty than when the error involves an area in which counsel has the prime responsibility for raising the matter. In the latter case, the court noted, the importance of the timely objection rule ought to weigh far more heavily because the court is dependent on counsel to appreciate the full significance of the error:

> The connection between the policy favoring speedy correction of prejudicial errors so as to avoid needless mistrials and the timely objection rule as to the introduction of evidence is close and substantial; the nexus between policy and rule as to the trial court's affirmative duties is more remote. Recognition of this difference explains the court's comparative reluctance to disregard the appellant's failure to timely object, and review the alleged error by calling it "fundamental", respecting evidentiary errors, as opposed to errors in the trial judge's discharge of his *sua sponte* obligations.

Id.

We believe that these cases demonstrate that, in determining whether an error constitutes a "fundamental error," the state courts of Indiana engage in a very particularized assessment of the impact of the error on the particular case. Characterizing the error as "fundamental" appears to be far more a function of the error's relationship to the policy concerns animating the state's timely objection requirement than of federal constitutional policy concerns. We therefore find ourselves confronted with a situation very much like the one that faced our colleagues on the Court of Appeals for the Tenth Circuit in their examination of New Mexico's fundamental error law in *Gutierrez v. Moriarity*, 922 F.2d 1464 (10th Cir.), *cert. denied*, 112 S. Ct. 140 (1991). Like New Mexico, but unlike Oklahoma, the jurisdiction that produced *Ake*, Indiana does not equate federal constitutional error with fundamental error. Like New Mexico, Indiana mandates review on the merits of fundamental rights claims only when the denial of the right "gives rise to a question of fundamental error as *defined by state law.*" *Gutierrez*, 922 F.2d at 1469 (emphasis supplied).

Accordingly, we believe that the determination of the Indiana appellate court, that no fundamental error resulted from the instruction, rests on an independent and adequate state ground. We therefore hold that habeas review in the federal courts is, as the district court determined, precluded.

B. *New Rule*

Because the foregoing discussion involves an issue on which there is no definitive guidance from the Supreme Court, *see Coleman*, 111 S. Ct. at 2560; *O'Dell v. Thompson*, 112 S. Ct. 618, 619-20 (1991) (statement of Blackmun, J., respecting the denial of certiorari), we shall not end our discussion with that point. We also hold that, even if the jury instruction issue did not rest on an independent and adequate state law ground, consideration of the issue by the district court would have been precluded by the holding of the Supreme Court in *Teague v. Lane*, 489 U.S. 288 (1989).

In *Teague*, the Supreme Court adopted the view first propounded by Justice Harlan in *Mackey v. United States*, 401 U.S. 667, 692-93 (1971), that habeas courts should generally only apply the constitutional standards that prevailed at the time the original proceedings took place. Indeed, as formulated by the Court, this rule of nonretroactivity for cases on collateral review has only two exceptions:

> First, a new rule should be applied retroactively if it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." Second, a new rule should be applied retroactively if it requires the observance of "those procedures that . . . are 'implicit in the concept of ordered liberty.' "

Teague, 489 U.S. at 307 (citations omitted). Thus, we must first determine whether granting the relief that Mr. Willis seeks would require us to announce a new rule. If we conclude that it would, then we may not reach the merits of his claim unless the rule he seeks falls within one of the two exceptions adopted in *Teague*.

The Supreme Court recently had occasion to decide a case involving arguments somewhat similar to Mr. Willis' contentions. *See Gilmore v. Taylor*, 113 S. Ct. 2112 (1993). In *Gilmore*, the Court was presented with the question whether a decision by this circuit that invalidated an Illinois pattern instruction because it unconstitutionally allowed a jury to return a murder verdict without considering whether the defendant had a mitigating mental state that would support a verdict of voluntary-manslaughter, announced a new rule and thus could not provide the basis for habeas relief under *Teague*. The Court noted that

> a decision announces a new rule "if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." . . . "The 'new rule' principle . . . validates reasonable, good-faith interpretations of existing precedents made by state courts," and thus effectuates the states' interest in

> the finality of criminal convictions and fosters comity between federal and state courts.

Gilmore, 113 S. Ct. at 2116 (citations omitted) (emphasis in the original).[7]

We certainly do not want to be misunderstood as condoning the problematic instruction at issue in this case. Nevertheless, it would not be appropriate for us to conclude that the decision reached by the Indiana appellate court in *Willis II*, on the basis of the established caselaw of the Supreme Court of Indiana and not in contravention of any explicit precedent of this court or, more importantly, the Supreme Court of the United States, was not a "reasonable, good-faith interpretation[ ] of existing precedents made by [the] state courts." *See id.* The matter was " 'susceptible to debate among reasonable minds.' " *Sawyer v. Smith*, 497 U.S. 227, 241 (1990) (quoting *Butler v. McKellar*, 494 U.S. 407, 415 (1990)). Thus, to grant Mr. Willis the relief he seeks we would have tc announce a new rule.

As we have already noted, under *Teague*, we cannot announce such a rule on collateral review unless it falls within one of the two narrow exceptions set forth by the Court. The first exception applies to rules that " 'place certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.' " *Gilmore*, 113 S. Ct. at 2119 (quoting *Teague*, 489 U.S. at 307). This exception is inapplicable to Mr. Willis, as the rule he seeks does not "decriminalize" any class of conduct. The second exception under which *Teague* permits the consideration of a new rule on collateral review concerns only " 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Gilmore*, 113 S. Ct. at 2119 (quoting *Teague*, 489 U.S. at 311). We are aware that the Supreme

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[7] In other words, "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Teague*, 489 U.S. at 301.

Court has held recently that an instruction relieving the state of the burden of proof beyond a reasonable doubt cannot be characterized as harmless error. *See Sullivan v. Louisiana*, 113 S. Ct. 2078 (1993). Yet, we do not believe that the instruction at issue here, whatever its potential for confusion, can be said to fall into that " 'small core of rules implicit in the concept of ordered liberty.' " *Gilmore*, 113 S. Ct. at 2119 (quoting *Graham v. Collins*, 113 S. Ct. 892, 903 (1993)). *Accord Sawyer*, 497 U.S. at 243; *Saffle v. Parks*, 494 U.S. 484, 495 (1990); *Williams v. Chrans*, 945 F.2d 926, 942 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 3002 (1992).

Accordingly, because awarding the relief that Mr. Willis seeks would require us to announce a rule that would be "new" within the meaning of *Teague*, and does not fall into one of *Teague*'s two narrow exceptions, we cannot reach the merits of Mr. Willis' request in a habeas proceeding.

Conclusion

For the foregoing reasons, the decision of the district court is affirmed.

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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APPENDIX B

David A. WILLIS, Appellant (Defendant Below),

v.

STATE of Indiana, Appellee (Plaintiff Below).

No. 64A03-8604-CR-101.

Court of Appeals of Indiana,
Third District.
Sept. 8, 1987.

Rehearing Denied Oct. 14, 1987.

Defendant was convicted by the Superior Court, Porter County, Roger V. Bradford, J., of theft, and defendant appealed. The Court of Appeals, Staton, J., held that: (1) imposition of presumptive sentence was not excessive; (2) defendant was not entitled to mistrial; (3) evidence regarding prior offense committed by defendant was properly admitted; and (4) defendant was not denied fair trial merely because law

books and periodicals were located in areas accessible to jury.

Affirmed.

Garrard, P.J., concurred in result.

*873 Lowell E. Enslen, Gary K. Matthews, Enslen, Enslen & Matthews, Hammond, Christopher Kirages, Indianapolis, for appellant.

Linley E. Pearson, Atty. Gen., Lisa M. Paunicka, Deputy Atty. Gen., Indianapolis, for appellee.

STATON, Judge.

David A. Willis appeals his conviction for theft, a class D felony, and the determinate prison term of two (2) years. This appeal raises six issues:

1. Whether the trial court committed reversible error when it imposed the presumptive sentence of two (2) years for a class D felony.

2. Whether the trial court committed reversible error when it did not grant a mistrial.

3. Whether the trial court committed reversible error when it allowed into evidence testimony regarding a prior offense committed by the defendant.

4. Whether the trial court committed reversible error when it allowed into evidence testimony regarding an attorney's utilization of trust accounts and general accounts.

5. Whether the defendant was denied a fair trial because law books and periodicals were located in areas accessible to the jury.

6. Whether the trial judge committed reversible error when he refused to recuse himself.

We affirm.

In August, 1981, David Willis was employed by Carol Durkin (Carol) to represent her three (3) children in litigation over her former deceased husband's life insurance proceeds. As a result of that litigation, on November 19, 1984, checks were issued to Carol's children, Steven and Lydia, [FN1] in the amount of fourteen thousand eight hundred eighteen dollars and forty-six cents ($14,818.46) each and mailed to Willis for distribution. Willis also received a check for attorney's fees in the amount of four thousand five hundred twenty-seven dollars and eighty-six cents ($4,527.86).

FN1. The disposition of the claims of the other child is not relevant to this case.

On November 30, 1984, Willis printed Steve's name, as well as his own, on the check payable to Steve and deposited it

into his trust account. [FN2] Also on November 30, 1984, Willis transferred eight hundred eleven dollars and fifty-four cents ($811.54) from his general account into his trust account, making a total deposit of fifteen thousand six hundred thirty dollars ($15,630.00) into his trust account that day. [FN3]

FN2. The check issued to Steve is the only one relevant to this case.

FN3. Prior to the November 30 deposit, Willis' trust account was overdrawn in the amount of fifteen dollars and thirty-nine cents ($15.39).

*874 On December 1, 1984, Willis wrote a check, from his trust account, payable to the Chesterton State Bank in the amount of fifteen thousand five hundred ninety-four dollars and sixteen cents ($15,594.16). This check was delivered pursuant to a plea agreement

entered into between Willis and the State on August 31, 1984. The plea agreement arose from a check deception charge filed against Willis on March 30, 1984. Under the agreement, the check deception charge would be dismissed if Willis made restitution within ninety (90) days, otherwise, he would be convicted of check deception and would be imprisoned for thirty (30) days.

Willis had never reached Carol or Steve to let them know the lawsuit had been settled and that he had the checks. However, Steve found out and appeared in Willis' office on February 18, 1985 to get his check. Willis wrote a check to Steve from his trust account for the sum of fourteen thousand eight hundred eighteen dollars and forty-six cents ($14,818.46). After Steve deposited the check, it was returned to him due to

insufficient funds. On April 8, 1985, after Steve had sent a letter to Willis demanding payment, Steve received a cashier's check for fifteen thousand five hundred dollars ($15,500.00).

I. Sentence

The first issue Willis raises is: after finding no mitigating circumstances and considering Willis's status as a former attorney, did the trial court commit reversible error by imposing a presumptive sentence of two (2) years? [FN4]

FN4. IC 35-50-2-7(a) (Burns Repl.1985): A person who commits a class D felony shall be imprisoned for a fixed term of two [2] years, with not more than two [2] years added for aggravating circumstances or not more than one year subtracted for mitigating circumstances; in

addition, he may be fined not more than ten thousand dollars [$10,000].

[1][2] The Indiana Rules for the Appellate Review of Sentences Rule 2 provides:

(1) The reviewing court will not revise a sentence authorized by statute except where such sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender.

(2) A sentence is not manifestly unreasonable unless no reasonable person could find such sentence appropriate to the particular offense and offender for which such sentence was imposed.

(Emphasis supplied.)

Fointno v. State (1986), Ind., 487 N.E.2d 140, 144. Willis contends that the sentence of two (2) years for him is manifestly unreasonable because the trial

judge failed to consider mitigating circumstances. However, at the sentencing hearing, the trial judge specifically found that there were no mitigating circumstances. A finding of mitigating factors is made within the discretion of the trial court. Stark v. State (1986), Ind., 489 N.E.2d 43, 48. When a defendant argues mitigating circumstances to a trial court, the sentencing judge is not obligated to explain why he has chosen not to make a finding of mitigation. Hammons v. State (1986), Ind., 493 N.E.2d 1250, 1254.

Willis also contends the sentence is manifestly unreasonable because the trial judge considered his status as a former attorney [FN5] when determining the sentence. In Hiller v. State (1980), Ind.App., 412 N.E.2d 293, 294, this court affirmed an aggravated sentence where the

trial judge found as an aggravating factor that the defendant was an attorney in a fiduciary position of trust and was an Officer of the Court. It would make no sense to say that the trial judge may consider the defendant's status as an attorney when enhancing the sentence but not when imposing the presumptive sentence.

FN5. Willis resigned from the Indiana Bar on January 20, 1986.

We are unable to conclude that the sentence of two (2) years is manifestly unreasonable in light of the nature of the offense and the character of the offender.

II.

Prosecutorial Misconduct

Willis next raises the issue whether the trial court commits reversible error when it *875 does not grant a mistrial or

give an immediate curative instruction when the prosecutrix allegedly misstates the law during voir dire examination?

During voir dire, the prosecutrix posed the following hypothetical:

PROSECUTRIX: Mr. DeMerse, if I was to tell you that the law in the State of Indiana and the law that will be instructed to you by the Judge is that in order to commit the offense of theft, you need not permanently deprive a person of their property. As an example, if I take your car and keep it for six months, five months, and I do it without your authorization and consent, but I give it back to you after six months, I am still guilty of theft. Do you think that is unfair at all?

I take your car without your consent, without your authorization. I use it for five to six months, drive around

with your car. At the end of five or six months, I give the car back to you, say, "Here you go." If I were to tell you that that is theft by Indiana statute and that is what the Judge is going to instruct you, would you follow that?

JUROR DEMERSE; Sure.

PROSECUTRIX: Does it make a difference to you if you didn't know that your car was stolen?

* * *

Suppose I was your attorney and you got a car as a part of a settlement in a case and I got the car. I didn't tell you that the settlement had happened and I drove the car around for five to six months and at the end of five to six months, I gave you the car. You didn't give me your authority or permission for me to drive that car. Does that make a difference to you?

JUROR DEMERSE: Sure.

Willis alleges that because the hypothetical failed to include intent as an element of theft, the prosecutrix misstated the law. Willis moved for a mistrial and upon denial of the motion requested a curative instruction. This request was also denied.

[3] Denial of a motion for mistrial is reviewable only for an abuse of discretion. Ramos v. State, (1982), Ind., 433 N.E.2d 757, 759. A mistrial should be granted only where the defendant has been placed in a position of grave peril to which he should not have been subjected. Hill v. State, (1986), Ind., 497 N.E.2d 1061, 1065. Ordinarily, if the jury is admonished, or if other reasonable curative measures are taken, no reversible error will be found. Ramos, supra, at 759. (Emphasis supplied.)

[4] In this case, the trial judge did not grant a motion or give an immediate curative instruction upon request. The trial judge determined that the combination of the preliminary and final instructions to the jury would solve the problem and that there was "no need to highlight it with an additional instruction." (R. 221). Deference is accorded the trial judge who is in a more advantageous position than the appellate court to gauge accurately the surrounding circumstances of the event and its probable impact on the jury. Hill, supra, at 1067.

We cannot conclude that the judge did not take reasonable curative measures when he instructed the jury on all elements of the offense; what counsel says is not evidence, and the law comes only from the judge. Thus, no reversible

error was committed when the trial judge denied the motion for mistrial.

III.

Prior Offenses

Willis contends that the trial court committed reversible error when it allowed into evidence testimony regarding a prior check deception charge and testimony regarding Indiana Supreme Court Disciplinary Complaints filed against him.

[5] We need not consider whether testimony regarding the Disciplinary Proceedings was erroneously admitted because Willis has waived that challenge. An appellant has the obligation to make the proper specific objection and to preserve the *876 record for appeal. Von Almen v. State (1986), Ind., 496 N.E.2d 55, 57. The record shows that the first reference to the Disciplinary

Complaint was made during cross-examination by the defense of a state's witness. The record shows no motion to strike the response referring to the Complaint. Subsequently, during direct examination by the State of its witness, reference was again made to the Disciplinary Complaint. The record shows no objection by the defense to questions concerning the Complaint. Thus, Willis waived any challenge he may have had. Furthermore, the defense itself brought up the matter on the direct examination of the defendant.

[6][7] Willis also contends that evidence regarding a prior check deception charge was erroneously admitted because it was irrelevant and highly prejudicial. Generally, evidence of prior offenses is not admissible to prove a defendant's propensity to commit a

crime or to prove his guilt of the crime charged. Malone v. State (1982), Ind., 441 N.E.2d 1339, 1345. However, such evidence may be admissible if probative on the question of motive or intent, particularly where the prior activity is related to the charged crime. Hobbs v. State (1984), Ind., 466 N.E.2d 729, 733. The admission of evidence having some tendency to render an inference of motive is made within the discretion of the trial court. Drummond v. State (1984), Ind., 467 N.E.2d 742, 747. The trial judge admitted the evidence in this case after determining that the check deception charge was relevant to the issues of motive and intent because the theft Willis was charged with occurred to satisfy the plea agreement arising from the check deception charge. We will not undermine the trial court's discretionary

determination that the testimony was admissible.

IV.

Expert Testimony

Willis next contends that the trial court committed reversible error when it allowed into evidence testimony regarding an attorney's utilization of trust accounts and general accounts. Willis argues that the State's witness was not qualified to testify about the accounts because the witness admitted that he did not have experience handling litigation accounts. However, the witness did testify that he is an attorney and a partner in a law firm that has both general and trust accounts. He further testified that he has attended seminars concerning trust responsibilities and has taught seminars concerning trusts and estates. Willis draws a distinction

between trust accounts in general and litigation trust accounts to argue that the witness was not qualified.

[8][9] An expert may be qualified by practical experience as well as by formal training and whether he is qualified as an expert is a matter within the sound discretion of the trial court. Hare v. State (1984), Ind., 467 N.E.2d 7, 19. The State's witness testified that he was familiar with general accounts and trust accounts. The extent of the witness's knowledge does not necessarily determine his competency as an expert but goes to the weight of his testimony to be determined by the jury. Lineback v. State (1973), 260 Ind. 503, 296 N.E.2d 788, 792. The trial judge did not abuse his discretion in finding the witness qualified to testify as an expert.

V.

Juror Access to Law Books

Willis next contends that he was denied a fair trial because law books and periodicals were left in areas accessible to the jury. The record shows that law books were shelved in a room through which jurors had to pass to reach the jury room. In addition, non-legal periodicals were located in the jury room.

Although in the trial of criminal causes in Indiana the jury are the judges of the law as well as the facts, this does not take away from the court the right to advise the jury as to the applicable law. Posey v. State (1956), 234 Ind. 696, 131 N.E.2d 145, 147. For this reason reversible error has been found when juries have referred to *877 law books during their deliberations. E.g. Newkirk v. State (1866), 27 Ind. 1; Jones v. State (1883), 89 Ind. 82. In

both of these cases, reversible error was found because the juries were influenced by material that would not have been admissible during the trial.

In contrast to these cases are cases where the juries have access to law books during deliberations, but no reversible error is found because the jury was influenced by materials such as annotated statutes that merely reiterated what the jury would have been informed of through instructions. E.g. Mulread v. State (1886), Ind., 7 N.E. 884; McClanahan v. State (1954), 233 Ind. 365, 118 N.E.2d 734; Posey, supra.

[10] In the case before us, there is evidence that the jury had access to law books and non-legal periodicals during deliberations. However, Willis has introduced no evidence that the jury was aware of the law books, used the law

books, or were influenced in their deliberations by the law books or the periodicals. Thus, there is no indication that the court's right to advise the jury as to the applicable law has been usurped, and there is no evidence that Willis has been prejudiced. Consequently, the error was harmless.

VI.

Motion for Recusation

Willis next contends that the trial judge committed reversible error when he refused to recuse himself after publicly commenting on an allegation in the Motion to Correct Errors.

The record shows that after the Motion to Correct Errors was filed, a newspaper reporter asked the trial judge about an allegation that the trial judge had spoken with Willis about law books in the jury room some two (2) years prior to

Willis' trial. The trial judge replied that he had never had the conversation with Willis and that, as to the law books, the door to the room containing the law books would have been closed during deliberations. This exchange was published in a local paper.

[11] Willis also contends that the trial judge should have disqualified himself because he engaged in ex parte communications with counsel before ruling on the Motion to Correct Errors. The record shows that it was the defense counsel who the judge was talking with so Willis may not now complain on appeal. Maneikis v. State (1980), Ind.App., 411 N.E.2d 669, 699.

[12] The law presumes that a judge is unbiased and unprejudiced in the matters which come before him. Where the judge has actual prejudice in a case,

justice requires that the judge disqualify himself. However, the record must show actual bias and prejudice against the defendant before a conviction will be reversed on the ground that the trial judge should have been disqualified. Smith v. State (1985), Ind., 477 N.E.2d 857, 864. Willis contends that because the judge violated the Canons of Judicial Conduct [FN6] he should have disqualified himself for bias and prejudice against Willis. This argument must fail.

FN6. Code of Judicial Conduct, Canons 3A(4), 3A(6):

(4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending pro-

ceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

(6) A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.

[13] We need not decide if the trial judge violated the Canons to reach this conclusion. Assuming, arguendo, that they were violated, Willis has still

failed to prove actual bias or prejudice against him as to deprive him of the right to be tried before an impartial judge. This is so primarily *878 because the remarks by the trial judge were made after Willis had been convicted and sentenced. Yager v. State (1982), Ind., 437 N.E.2d 454, 462.

Furthermore, the remarks made by the trial judge concerned an allegation that bore no material relevance to an issue raised in the Motion to Correct Errors. Whether or not the trial judge and Willis had a conversation concerning the law books in the jury room two (2) years prior to trial is irrelevant to the issue of whether the jury in Willis' trial had access to law books. Thus, even if the trial judge had committed error, the error would have been harmless.

Affirmed.

GARRARD, P.J., concurs in result.

BUCHANAN, J., concurs.

APPENDIX C

STATE OF INDIANA) IN THE PORTER SUPERIOR
) COURT
COUNTY OF PORTER) ANNUAL TERM, 1988

STATE OF INDIANA)
)
VS.) CAUSE NO. 85-PSCR-49
)
DAVID A. WILLIS)

ORDER

Comes now the Court and having had under advisement the Defendant's amended Petition for Post Conviction Relief, now rules as follows:

1. That the allegations contained in Paragraph 5a of the amended Petition for Post Conviction Relief should be, and are hereby, SUSTAINED.

2. That with reference to said holding with respect to Paragraph 5a, the Court makes the following findings:

A. That the transcript of the evidence at the trial of the cause of action

contained no prior inconsistent statements from any witness.

B. That, therefore, the prior inconsistent statement instruction given by the Court as its final instruction number 7 was not based upon any evidence. 490 NE2d 1083.

C. That the rhetorical content of said instruction, being in part, "Evidence of this kind may be considered by you...as substantial evidence of the guilt of the defendant," denied to this defendant his right of confrontation and due process, at least implicitly, with respect to any witness to be tested in the area of prior inconsistent statements upon impeachment.

D. That the aforesaid inconsistent statement instruction as given is constitutionally deficient in that it erroneously and improperly fuses and relates

the legal concepts of credibility of witnesses and guilt of the defendant to the end that the jury could have deduced and equated noncredible witnesses (prior inconsistent statements) with the guilt of the defendant; inconsistent statements of other witnesses can never be evidence of a defendant's guilt; the above quoted last sentence of said instruction should be stricken therefrom.

E. That the existence of the above and foregoing last sentence of said instruction, above quoted, is contrary to the weight of authority, in like matters, in the Federal legal system and most State legal systems.

F. That the defendant has not waived this allegation, for no reasonable Judge or lawyer would have raised the issue in the normal course, it being a pattern instruction, and that it is of

demanding consequence and proportion constitutionally.

G. That based upon the accepted legal principal of jury adherence to instructions, the giving of said instruction constituted fundamental error and denied the defendant of a fair trial.

3. That the allegations contained in Paragraph 5b of the amended Petition for Post Conviction Relief should be, and are hereby, SUSTAINED.

4. That with reference to said holding with respect to paragraph 5b the Court makes the following findings:

A. That the evidence introduced into the record of the disciplinary proceedings against this defendant was in violation of the Trial Court's Order in Limine; that the defendant in his cross examination of witness Staton did not "open the door" to the entrance of such

evidence; that subsequent to the Order in Limine, the State, in the first instance, pursued the same and continued its pursual. 489 NE2d 58; that the defendant's response thereto, in his testimony in chief, was his only strategy after the damage; that the shear volume of evidence of the disciplinary proceedings incepted and pursued by the State was prejudicial to the defendant.

B. That the Trial Court's final instruction number 15 was not curative of this error for the reason that it did not tell the jury in what form to consider the evidence of bad acts--how they could use it. 501 NE2d 1032.

C. That the introduction of the evidence with reference to the disciplinary proceedings and bad acts against this defendant violated his equal protection rights under the constitution of the

united States (U.S.C.A. Const., Amendment 14) and the Constitution of the State of Indiana (Article 1, Section 23) for the reason that this defendant--lawyer was then confronted with the necessity of higher standard of defense, a lesser presumption of innocence, and a higher standard of required conduct to defend than the lay defendant. The Prosecutor's statement in her summation, "it is just not fair to put the burden on us as to his actions." (R651).

D. That the briefing before the Court of Appeals on direct appeal was not accurate as to the defendant's timely objections to the introduction of such evidence; that the issue was not waived.

E. That the evidence introduced as to the defendant's bad acts and disciplinary matters should have been excluded as irrelevant to the crime charged.

F. That due to the introduction of such evidence fundamental error was committed and the defendant did not receive a fair trial. 347 SE2d 703; 792 F.2d 1408 (9th Circuit).

5. That the allegations contained in pleading Paragraph 5c of the amended Petition for Post Conviction Relief should be, and are hereby, overruled; the Court finds that the doctrine of res adjudicata is applicable in that the issue was decided on direct appeal.

6. That the allegations contained in pleading paragraph 5d of the amended Petition for Post Conviction Relief should be, and are hereby, overruled; the Court finds that the doctrine of res adjudicata is applicable in that the issue was decided on direct appeal.

7. That the allegations contained in pleading paragraph 5e of the amended

Petition for Post Conviction Relief should be, and are hereby, overruled; the Court finds that the doctrine of res adjudicata is applicable in that the issue was decided on direct appeal.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by this Court based upon the above and foregoing findings and rulings that the verdict of the jury in this cause of action is hereby set aside, the judgment of conviction heretofore entered is vacated, the sentence pronounced is hereby vacated and a new trial is ordered for said defendant on said charge.

ALL OF WHICH IS ORDERED THIS 28TH DAY OF NOVEMBER, 1988.

JOHN L. RICHERT

John L. Richert, Special Judge
Porter Superior Court

APPENDIX D

STATE of Indiana, Appellant (Plaintiff Below),

v.

David A. WILLIS, Appellee (Defendant Below).

No. 64A038905PC175.
Court of Appeals of Indiana, Third District. April 11, 1990.

Rehearing Denied June 12, 1990.

After his theft conviction was affirmed on direct appeal, 512 N.E.2d 871, prisoner petitioned for postconviction relief. The Superior Court, Porter County, John L. Richert, Special Judge, granted relief, and State and petitioner both appealed. The Court of Appeals, Staton, J., held that: (1) instruction that prior inconsistent statement could be considered in deciding weight to be given to testimony of witness as well as substantial evidence of guilt of defen-

dant was not fundamental error;
(2) instruction that jury could determine the law did not deny basic constitutional rights and due process; and
(3) instruction that allowed jury to find that defendant either knowingly or intentionally exerted unauthorized control over the property of another did not result in a verdict that was not unanimous.
Affirmed in part; reversed in part.
Shields, P.J., concurred in result with separate opinion.

***513** Linley E. Pearson, Atty. Gen., Gary Damon Secrest, Deputy Atty. Gen., Indianapolis, for appellant.

James M. Shellow, Dean A. Strang, Shellow, Shellow & Glynn, S.C., Anne Willis Reed, Reinhart, Boerner, Van Deuren, Norris & Rieselbach, S.C., Milwaukee, Wis., Christopher Kirages,

Stark Doninger Mernitz & Smith, Indianapolis, Christopher A. McQuillin, Law Offices of Ronald P. Nelson, Valparaiso, for appellee.

STATON, Judge.

The State of Indiana appeals the judgment of the post-conviction court vacating the conviction of David A. Willis and ordering a new trial. Willis cross appeals.

The parties present this court with five issues:

1. Whether a jury instruction which stated that an inconsistent statement could be used to decide the weight to be given a witness' testimony as well as substantial evidence of the defendant's guilt was fundamental error?

2. Whether it was error for the trial court to allow evidence of disciplinary complaints?

3. Whether an instruction that the jury could determine the law denied Willis basic constitutional rights and due process?

4. Whether an instruction that allowed the jury to find that Willis either knowingly or intentionally exerted unauthorized control over the property of another resulted in a verdict that was not unanimous?

5. Whether the issue of Willis' sentence is res judicata?

David A. Willis, an attorney, was convicted of theft at a trial by jury and received a presumptive sentence of two years. His conviction was affirmed on direct appeal. Willis v. State (1987), Ind.App., 512 N.E.2d 871, rehear. denied, trans. denied. He ***514** petitioned for post-conviction relief on five grounds. The post-conviction court granted relief

on two grounds and denied relief on three. Additionally, it set aside the jury verdict, vacated the judgment of conviction and sentence, and ordered a new trial. The State and Willis both appeal.

I.

Inconsistent Statements

[1] The State claims the post-conviction court erred by granting Willis relief based on the following jury instruction: The credibility of a witness may be attacked by introducing evidence that on some former occasion the witness [made a statement] inconsistent with his testimony in this case. It is inconsistent if the witness denied making the prior statement or if the witness could not remember making the prior statement. Evidence of this kind may be considered by you in deciding the weight

to be given to the testimony of that witness as well as substantial evidence of the guilt of the defendant.

R. 61 (brackets in original).

Willis did not object to this instruction at trial or on direct appeal. He raised it in his petition for post-conviction relief on the grounds that it was fundamental error. The thrust of his argument is that this instruction chills the right of confrontation because the inconsistent statement of any witness could be considered by the jury as substantial evidence of guilt. A similar instruction was discussed by our Supreme Court in Smith v. State (1986), Ind., 490 N.E.2d 300, 303. The instruction discussed in Smith was the same except the word "substantive" was used in the last sentence instead of the word "substantial". In Smith our Supreme Court stated:

Appellant claims this instruction is confusing and misleading since it indicates that evidence of merely making inconsistent statements could be considered substantive evidence of guilt. We see no merit to this argument.

Willis has made the same argument and although the two words have different meanings Smith is decisive. The use of this instruction was not fundamental error. The post-conviction court is reversed in granting relief on this issue.

II.

Disciplinary Evidence

[2][3] The post-conviction court also granted Willis relief on the grounds that evidence of disciplinary complaints should not have been admitted. Although this issue has been decided on direct appeal the post-conviction court granted

relief because it believed this court was misled by a statement in the brief submitted by the State. Both parties had the opportunity to submit briefs on direct appeal and appellants frequently submit reply briefs to respond to issues not covered in the original brief. Such issues can also be raised in a petition for rehearing. Willis has had several opportunities to correct any perceived error. An issue addressed on direct appeal is not a proper subject for post-conviction relief. Johnson v. State (1986), Ind., 502 N.E.2d 90, 91. This issue has been determined on direct appeal and further review is foreclosed by the doctrine of res judicata. Frasier v. State (1977), 267 Ind. 24, 366 N.E.2d 1166, 1167. The post conviction court is reversed in relief to Willis on this issue.

III.

Jury as Judge of the Law

[4] Willis contends that the instruction given by the trial court which informs the jury that it is the judge of the law as well as of fact denied him basic constitutional rights and due process. The instruction is as follows:

Since this is a criminal case the Constitution of the State of Indiana makes you the judge of both the law and the facts. Though this means that you are to determine the law for yourself, it does not mean that you have the right to make, repeal, disregard, or ignore the law as it exists. The instructions of the court are the best source as to the law applicable to this case.

*515 R. 55. Although Willis failed to object to this instruction at trial he now challenges it as fundamental error.

Article 1 section 19 of the Indiana Constitution states that:

In all criminal cases whatever, the jury shall have the right to determine the law and the facts.

This constitutional provision is an extra safeguard for the criminal defendant. From a practical viewpoint, the trial court determines the law in all procedural matters, and during the trial when the jury participates in the criminal judicial process, it is the trial court judge who determines the law as to the admissibility of evidence, motions for direct acquittal, mistrial, and the granting of a new trial. As Justice Arterburn pointed out in Beavers v. State:

We also know in practice that the judge in criminal cases determines the law in all procedural matters; that during the trial the judge, not the jury, determines the law as to the admissibility of the evidence, and thereafter on a motion to direct an acquittal, or for a new trial he again determines the law. If a jury is the "exclusive" judge of the law, then it should determine all such questions of law including the competency of the evidence so offered. If the jury is the exclusive judge of the law one may be asked what right does a trial court have to set aside a jury's verdict because it is contrary to law, or the evidence is insufficient when measured by legal rules? If the jury is the exclusive judge of the law its verdict of guilty would be final regardless of the court's belief that it was rendered in

legal error. Juries are not at liberty to create new offenses, or find a defendant guilty of an offense not charged even though they might attempt to do so, because the judge in the last analysis has a duty under his oath to invoke the constitution, and prevent a travesty on justice.

It has been said that juries are judges of the law only in the sense that their verdicts of acquittal are not open to correction when they disregard the law.

While the jury, under such a provision, have the right to determine both the law and the facts, it is not strictly true that they are the sole judges of the law of the case. Such a provision means that the jury have the right to determine all questions of law applicable to such matters as they are required to consider

in making up their verdict. It is their duty to apply the law to the facts of the case, and they have to be judge of both, to come to a conclusion as to both. But the constitutionality of a statute under which a person is prosecuted is a matter for the court to determine, and it is the duty of the jury to accept the court's determination thereof.

It is quite apparent that legally and factually it is erroneous to say that the jury is the "exclusive" judge of the law in criminal cases regardless of what may have been inadvertently stated in the past by this court as a result of very little, if any, examination of this question.

(1957), 236 Ind. 549, 557, 141 N.E.2d 118, 122 (our emphasis) (internal quotation marks omitted; citations omitted).

Willis, however, claims that this instruction deprives criminal defendants of basic constitutional protections. His claims of constitutional deprivation are based on the assumption that the instruction encourages the jury to ignore existing law and allows them to revise the elements of the charged offense, thereby depriving the defendant of notice of the crime with which he is charged and restricting his ability to present an effective defense.

The instruction at issue in this case clearly states that the jury does not "have the right to make, repeal, disregard, or ignore the law as it exists." Willis claims this language is meaningless. We find it to be clear and unambiguous. We have reviewed the other jury instructions given by the trial court and they provided the jury with all the

information necessary on the law applicable to this case; the jury had adequate guidance on "the law as it exists."

***516** Willis' contention that he did not know what law the jury would apply in coming to their verdict is no more persuasive then would be the argument that he did not know what weight the jury would put on the facts or what credibility the jury would attribute to certain witnesses.

This instruction has been challenged on other grounds without success. It has been specifically approved by our Supreme Court in Johnson v. State (1988), Ind., 518 N.E.2d 1073, 1076.

No fundamental error exists.

IV.

Culpability Instruction

[5] Willis contends the jury instruction given by the trial court on

culpability was unconstitutional because it did not distinguish between knowingly and intentionally. He contends this allowed the jury to reach a verdict that was not unanimous. The disputed jury instruction merely set out the elements of the crime of theft as defined by IC 35-43-4-2 (Burns Code Ed., 1989 Supp.) which states in pertinent part:

A person who knowingly or intentionally exerts unauthorized control over property of another person, with intent to deprive the other person of any part of its value or use, commits theft, a Class D felony.

(Emphasis added.) According to the statute the action can be knowing or intentional. Conduct that is engaged in intentionally is necessarily engaged in knowingly. Trevino v. State (1981), Ind.App., 428 N.E.2d 263, 267. Therefore

it is clear that the jury reached a unanimous verdict that Willis knowingly committed theft.

V.

Sentence

Willis contends that although we have already reviewed his sentence on direct appeal we should reconsider it in light of Fugate v. State (1987), Ind.App., 516 N.E.2d 75, an opinion that was published after our disposition of his appeal. We decline to reconsider this issue because it is res judicata. Frasier at 366 N.E.2d 1167. Furthermore, we note that the case Willis refers us to would not change our disposition of the issue because it involved an inaccurate presentence report, consideration of an acquittal in sentencing, aggravating factors, and the opinion was not unanimous.

The post-conviction court is reversed upon Issue I, Inconsistent Statements and Issue II, Disciplinary Evidence. The post-conviction court is further ordered to re-instate the jury verdict, reinstate the judgment of conviction and sentence and to vacate its order granting a new trial. In all other things, the post-conviction court is affirmed.

GARRARD, P.J., concurs.

SHIELDS, P.J., concurs in result on Issue I with separate opinion.

SHIELDS, Judge, concurring in result on Issue I.

I concur in result as to Issue I, Inconsistent Statements. Willis has waived the issue because it was available on his direct appeal and he does not claim his appellate counsel was ineffective for failing to raise it. I agree

with the majority that the particular issue Willis seeks to raise, that the instruction allowed him "to be convicted upon 'evidence' that is not evidence at all--that is, the mere existence of a prior inconsistent statement ... [and deprived [Willis] of his confrontation right as well because it acted as a bar to impeachment on prior inconsistent statements" (Appellant's Brief at 14) was resolved adverse to Willis's position in Smith v. State (1986), Ind., 490 N.E.2d 300, 303. However, I disagree with the implication in the majority decision that Smith in any way addresses the substantial difference in meaning between the words "substantive" and "substantial." In all other respects I concur in the majority opinion.

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

DAVID A. WILLIS,

Petitioner,

vs. Case No. H91-147

JAMES E. AIKEN, Commissioner,
Indiana Department of Corrections,
et al.,

Defendants.

MEMORANDUM OPINION AND ORDER

This matter is before the Court on Petitioner, David A. Willis' ("Willis"), Petition under 28 U.S.C. §2254 for Writ of Habeas Corpus by a Person in State Custody filed on May 1, 1991. For the reasons set forth herein, Willis' Petition is DENIED.

BACKGROUND

Willis was convicted on February 6, 1986 on a charge of felony theft. The trial judge sentenced him to

two years in prison. Willis' conviction was affirmed by the Indiana Court of Appeals on September 8, 1987. See Willis v. State, 512 N.E.2d 871 (Ind. App. 1987). Transfer to the Indiana Supreme Court was denied without opinion on December 29, 1987. On post-conviction review, the post-conviction court reversed Willis' conviction and ordered a new trial on November 28, 1988. The State appealed the post-conviction determination to the Indiana Court of Appeals, which reversed the post-conviction court and reinstated the conviction on April 11, 1990. See State v. Willis, 552 N.E.2d 512 (Ind. App. 1990). The Indiana Supreme Court denied transfer without opinion on April 10, 1991. Willis' current Petition for habeas relief followed.

DISCUSSION

By his Petition, Willis requests a new trial and raises three grounds as bases for the requested relief. First, Willis contends that the State obtained affirmance of his conviction by misrepresenting the record on direct appeal. Second, Willis asserts that the jury was allowed to reject fundamental constitutional guarantees and, if it chose, to rewrite the elements of the offense charged by way of an instruction stating that the jury is the judge of the law. Finally, Willis argues that he was denied due process when the jury was instructed that all prior inconsistent statements, by whomever made and whatever their content, were substantial evidence of his guilt. In response to Willis' Petition, the State contends that Willis has procedurally defaulted and consequently cannot obtain habeas relief.

The State agrees that Willis has exhausted his state court remedies with respect to the grounds raised in his Petition.

State's Misrepresentation on Direct Appeal

Willis argues that on direct appeal the State represented to the appellate court that certain evidence concerning ethical complaints to the attorney Disciplinary Commission was first elicited by Willis without objection and that he therefore waived any error concerning the admissibility of the evidence. He adds that the State first referred to that evidence in its opening statement and offered the disciplinary complaint evidence in violation of an order in limine. Willis further contends that the appellate court relied on the representation by the State in its

affirmance of the conviction, and later refused to correct the error on review of the post-conviction court's determination. By all of these actions, Willis asserts, the State of Indiana deprived him of due process of law.

The record reflects that the first mention of Willis disciplinary proceeding arose in the State's opening statement. Willis subsequently moved for a mistrial. The motion was denied, but the court issued an order in limine prohibiting evidence on the disciplinary proceeding beyond the filing of the complaint. Furthermore, the trial court indicated that it would instruct the jury that the disciplinary proceeding was a totally separate proceeding and that the outcome of that disciplinary action had nothing to do with the case at bar. (R. 251-255.)

On cross-examination of the complainant, Steve Staton, Willis elicited a reference to the filing of the Staton complaint with the disciplinary committee. (R. 302.) No motion to strike appears on the record. Another mention of the Staton disciplinary complaint was elicited by the State on redirect examination of the complainant's wife. (R. 316-17.) There, the State appeared to attempt to elicit evidence outside the scope of the order in limine. Willis objected and the court sustained the objection, struck the witness' answer to the State's question, and admonished the jury to disregard the witness' answer. (R. 322.)

Willis himself testified that Mary Beth Staton wrote and filed a disciplinary complaint against him, that he learned of it only after he paid the dis-

puted money to the complainant, Steve Staton, and that he thought he responded to the Staton complaint. (R. 573-74.) Willis also testified that he resigned voluntarily from the state bar. (R. 575-76.) On cross-examination, the State elicited testimony with respect to the filing of the Staton complaint, its resolution, and other disciplinary complaints. (R. 583-90.) Willis did not object to the evidence admitted on direct or cross-examination during his testimony.

Willis framed the issue on appeal as the erroneous admission of testimony regarding the disciplinary proceedings at issue. (Brief of Defendant-Appellant, No. 64A03-8604-CR-101, at 2.) The representation by the State complained of by Willis is as follows:

> The evidence reveals that the first reference to such a complaint arose

> during the cross-examination of Steve Staton by the defense.
>
> * * *
>
> [T]he Defendant neither objected nor moved to strike any reference to disciplinary commission complaints.

(Brief of Appellee, No. 64A03-8604-CR-101, at 22, 24) Thus, the error alleged by Willis on appeal regarded testimony, and the State's representation was not inaccurate or misleading when considering the evidence adduced rather than the record as a whole. Nor does this Court construe the statement that Willis failed to object or move to strike references to disciplinary complaints as a misrepresentation. The evidence complained of in Willis' Petition concerns testimony regarding disciplinary complaints in violation of the in limine order. (Brief in Support of Petition for Habeas Corpus, at 28) The subject in limine order allowed evi-

dence of the filing of disciplinary commission complaints. Willis objected at trial, if at all, to potential evidence outside the scope of the in limine order; he did not at trial and does not now object to evidence of the filing of disciplinary complaints which complied with the order in limine.

Moreover, the State did not base its argument on appeal on this alleged "misrepresentation." Instead, the State based its position on the absence of an objection to the evidence adduced on cross-examination of Willis, the fact that the testimony of Mrs. Staton served to complete the story of the commission of the charged offense, and the trial judge's curative instruction to the jury.

Furthermore, the Court of Appeals did not rely exclusively on the

State's representation to reach its finding. In part, it relied on an alternative ground for waiver not advanced by the State. That is, the Court of Appeals found that Willis waived any error concerning the admissibility of disciplinary complaints by presenting the evidence himself. Willis, 512 N.E.2d at 876; see also Collins v. State, 464 N.E.2d 1286, 1290 (Ind. 1984). In addition, the Indiana Court of Appeals itself declined to find that it had been misled, and reversed the post-conviction court on procedural grounds separate from any reliance on the State's representation. 552 N.E.2d at 514. In sum, Willis' contention that his due process rights were violated because of an alleged misrepresentation is unpersuasive.

To the extent that Willis contends the admission of evidence pertain-

ing to disciplinary complaints deprived him of due process, he cannot prevail due to his procedural default. The United States Supreme Court has held "that it will not consider an issue of federal law on direct review from a judgment of a state court if that judgment rests on a state-law ground that is both 'independent' of the merits of the federal claim and an 'adequate' basis for the court's decision." Harris v. Reed, 489 U.S. ____, 260, 109 S. Ct. 1038, 1042 (1989) (citations omitted). This doctrine "has been applied routinely to state decisions forfeiting federal claims for violation of state procedural rules." Id. (quoting Meltzer, State Court Forfeiture of Federal Rights, 99 Harv. L. Rev. 1128, 1134 (1986) (footnote omitted)). However, "the mere fact that a federal claimant failed to abide by a

state procedural rule does not, in and of itself, prevent [the] Court from reaching the federal claim: 'the state court must actually have relied on the procedural bar as an independent basis for its disposition of the case.'" Id. (quoting Caldwell v. Mississippi, 472 U.S. 320, 327, 105 S. Ct. 2633, 2638, 86 L. Ed. 2d 231 (1985)).

To determine whether procedural default at the state court level bars federal review of the federal claim, this Court must look to the decision reached by the Indiana Court of Appeals. Only when a state court decision fairly appears to rest primarily on federal law or to be interwoven with such law is a plain statement of a procedural ground required to ensure that the federal court knows whether the state is relying on its own law as the basis of a decision.

Coleman v. Thompson, 111 S. Ct. 2546, 2559 (1991). "A state ground is 'independent' only if the state court actually relied on a state rule sufficient to justify its decision." Prihoda v. McCaughtry, 910 F.2d 1379, 1382 (7th Cir. 1990). "A state ground is 'adequate' only if the state court acts in a consistent and principled way. A basis of decision applied infrequently, unexpectedly, or freakishly may be inadequate, for the lack of notice and consistency may show that the state is discriminating against the federal rights asserted." Prihoda, 910 F.2d at 1383 (citing Johnson v. Mississippi, 486 U.S. 578, 587-89, 108 S. Ct. 1981, 1987-88, 100 L. Ed. 2d 575 (1988); Barr v. City of Columbia, 378 U.S. 146, 149, 84 S. Ct. 1734, 1736, 12 L. Ed. 2d 766 (1964); c.f. Howlett v. Rose, _____ U.S. _____,

110 S. Ct. 2430, 2440, 110 L. Ed. 2d 332 (1990)).

"The adequate and independent state ground doctrine [] . . . is of concern . . . in Federal habeas proceedings pursuant to 28 U.S.C. § 2254." Harris v. Reed, 489 U.S. at 262, 109 S. Ct. at 1042-43; Wainwright v. Sykes, 433 U.S. 72, 81, 87, 97 S. Ct. 2497, 2503, 2506, 53 L. Ed. 2d 594 (1977). As the Court explained in Harris v. Reed:

> Under Sykes and its progeny, an adequate and independent finding of procedural default will bar federal habeas review of the federal claim, unless the habeas petitioner can show "cause" for the default and "prejudice attributable thereto," Murray v. Carrier, 477 U.S. 478, 485, 106 S. Ct. 2639, 2644, 91 L. Ed. 2d 397 (1986), or demonstrate that failure to consider the federal claim will result in a "'fundamental miscarriage of justice."' Id., at 495, 106 S. Ct. at 2650 (quoting Engle v. Isaac, 456 U.S. 107, 135, 102 S. Ct. 1558, 1576, 71 L. Ed. 2d 783 (1982). See also Smith v. Murray, 477 U.S. 527, 537,

106 S. Ct. 2661, 2668, 91 L. Ed. 2d 434 (1986).

489 U.S. at 262, 109 S. Ct. at 1043.

The evidence complained of by Willis was elicited from him during cross-examination, and no objection was made. The Court of Appeals found that Willis waived the issue because he himself "brought up the matter on direct examination." 512 N.E.2d at 876; Collins, supra. In addition, the appellate court found that Willis waived a challenge to evidence adduced regarding disciplinary complaints by failing to object on the record. Id. While objections to disciplinary complaint evidence and to the State's opening statement did appear on the record as a whole, Willis failed to contemporaneously object to such evidence adduced during his cross examination. Indiana requires a contemporaneous objection in order to preserve evidentiary

questions for appeal. E.g., Gambill v. State, 479 N.E.2d 523, 526 (Ind. 1985). Moreover, once an order in limine is entered, a party must object to the admissibility of evidence alleged to be in violation of the order or he waives the error of admission on appeal. Remsen v. State, 495 N.E.2d 184, 189 (Ind. 1986). The appellate court's decision on appeal from the post-conviction determination was based on an application of res judicata derived from the opinion on direct appeal, and on another state procedural ground. Thus, both appellate decisions squarely rest on state law grounds and neither fairly appears to rest on federal law or is interwoven with federal law. Because the state rules relied upon were sufficient to justify the decisions, and because those grounds described above were applied in a consis-

tent manner, the subject state grounds are independent and adequate as contemplated by the adequate and independent state ground doctrine. Accordingly, habeas relief is precluded absent a showing of cause for the default and resulting prejudice. Wainwright v. Sykes, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977).

Willis has failed to present sufficient cause for the procedural defaults described herein. A contemporaneous objection could have been presented to the trial court at sidebar. Indeed, at least two sidebars were initiated by Willis on other occasions during trial. Thus, Willis clearly had an avenue available for placing objections on the record without influencing the jury. State law was clear at the time of trial with respect to Willis' obligations to object

contemporaneously. Nor is Willis' argument that he relied on prior objections persuasive. He testified himself with respect to disciplinary complaints. Given his testimony, it would be impossible for the trial court to know which portions of the cross examination were objectionable to Willis. Finally, Willis made a tactical decision to introduce evidence of disciplinary complaints during his direct examination. He cannot and does not now advance that he had "cause" to induce the alternative grounds for waiver articulated by the appellate court.

Furthermore, Willis cannot establish that he was prejudiced by the procedural defaults. Willis decided to present evidence on the matter himself. Moreover, the trial court instructed the jury that disciplinary complaints may be

filed by anyone, that such complaints are merely the method of requesting an investigation, and that the facts that such a complaint was filed and that Willis resigned from the Bar were not to be considered by the jury as evidence of guilt. (R. 70.) This instruction served to cure potential prejudice to Willis respecting the subject evidence. Finally, for all of the foregoing reasons, this Court finds that the evidence adduced on cross examination of Willis did not render the trial so fundamentally unfair or manifestly unjust to warrant excuse of Willis' procedural default. See Stomner v. Kolb, 930 F.2d 1123, 1129 (7th Cir. 1990) (introduction of improper evidence of other crimes will not support granting of writ of habeas corpus or necessarily create fundamentally unfair trial).

Prior Inconsistent Statement Jury Instruction

Willis contends that the trial court erred when giving the following jury instruction:

> The credibility of a witness may be attacked by introducing evidence that on some former occasion the witness [made a statement] inconsistent with his testimony in this case. It is inconsistent if the witness denied making the prior statement or if the witness could not remember making the prior statement. Evidence of this kind may be considered by you in deciding the weight to be given to the testimony of that witness as well as substantial evidence of the guilt of the defendant.

(R. 61) (brackets in original). Specifically, Willis argues that the instruction advises the jury that evidence of any prior inconsistent statement by a witness may be considered by the jury as substantial evidence of the guilt of the Defendant; no matter who testified to the prior inconsistent statement or

what the content of this statement was. This, Willis contends, denied him of his right to confrontation as guaranteed by the Sixth Amendment and denied him due process of law by authorizing an inference of guilt from proof of a fact which has no rational connection with guilt. The State argues that this issue has been procedurally defaulted, as Willis raised no specific objection to the instruction when it was given at trial. See Cox v. State, 475 N.E.2d 664, 669 (Ind. 1985); Howard v. State, 431 N.E.2d 868, 870 (Ind. App. 1982). The State also contends that Willis waived this issue when he failed to raise it on direct appeal. Willis argues that the procedural default is excused because the instruction constitutes fundamental error.

On appeal from the post-conviction determination, the Indiana Court of

Appeals found that tendering the instruction was not fundamental error. 552 N.E.2d at 514. Willis contends that the appellate court's decision provided a basis for federal jurisdiction in that Indiana's fundamental error doctrine is interwoven with federal law and is applied inconsistently. Thus, Willis argues, the state grounds articulated by the appellate court are not adequate and independent so as to preclude federal habeas review. However, a review of the appellate court opinion demonstrates that its finding was based purely on state law grounds. That is, the Court of Appeals analyzed Willis' claim according to an Indiana Supreme Court opinion. 552 N.E.2d at 514 (citing Smith v. State, 490 N.E.2d 300, 303 (Ind. 1986)). The only mention of federal law was the Court of Appeals' description of Willis' claim for

relief. The appellate court relied on a state rule sufficient to justify its decision, and applied that rule in a consistent manner to the appeal before it. Accordingly, the state ground relied upon is independent and adequate for purposes of barring federal habeas review.

Thus, Willis must show cause for his procedural default and actual prejudice resulting therefrom in order to obtain habeas relief. Wainwright, supra. Willis contends that the argument is a novel one and suggests that this is sufficient cause for his failure to object at trial or raise the issue on appeal. However, there has been no change in the law which would have made his argument less viable then than it is now. Willis does not allege that he lacked the necessary tools to construct his arguments at the time of trial. No contentions have

been made that his attorney was ineffective. See Murray v. Carrier, 477 U.S. 478, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986). Because Willis can show no objective factor external to the defense which impeded his efforts to comply with the State's procedural rules, or that the State impeded his efforts to comply with the rules, he can show no cause for the default. Id.

Moreover, Willis cannot show that he was actually prejudiced by the jury instruction at issue. To prevail, Willis must show not only that the alleged erroneous instruction created a possibility of prejudice, but that it "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimension." United States v. Frady, 456 U.S. 152, 170, 102 S. Ct. 1584, 1596, 71 L. Ed. 2d

816 (1982) (emphasis in original). The record reflects that the trial contained no prior inconsistent statements from any witness whereby a jury could erroneously apply the prior inconsistent statement jury instruction. If desired, the defense attorney could have approached the bench to present an objection to such an instruction in order to impeach a witness with a prior inconsistent statement without fear of misapplication of the pattern instruction. Finally, Willis does not now point to any witness at his trial who was subject to impeachment by a prior inconsistent statement.

Furthermore, even if Willis had properly preserved his claim, any error in the jury instruction was harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). The standard

applied by the United States Supreme Court in this regard is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict of the jury. Yates v. Evatt, 111 S. Ct. 1884, 1892-93 (1991). Here, the nonexistent prior inconsistent statements are clearly unimportant in relation to the actual evidence the jury heard concerning petitioner's guilt. Clearly, the instruction did not so infect the entire trial that the resulting conviction violated due process. Frady, 456 U.S. at 169, 102 S. Ct. at 1595. For these same reasons, the subject jury instruction did not consist of fundamental error or render the trial fundamentally unfair.

Jury-As-Judge-Of-The-Law Instruction

At trial, the jury was instructed in part as follows:

> Since this is a criminal case the Constitution of the State of Indiana makes you the judge of both the law and the facts. Though this means that you are to determine the law for yourself, it does not mean that you have the right to make, repeal, disregard, or ignore the law as it exists. The instructions of the court are the best source as to the law applicable to this case.

(R. 55.) Willis contends that the jury was empowered to ignore his constitutional rights and rewrite the elements of the offense charged in his case by way of this instruction, thus depriving him of his constitutional rights under the Fourteenth Amendment. Willis also argues that the State in its closing argument invited the jury to shift the burden of proof to the defense, thus aggravating the harmful effect of this instruction. (R. 651.) Again, Willis failed to object to the jury instruction at trial or to raise this issue on direct appeal.

In its decision reversing the post-conviction court, the Court of Appeals determined that the instruction did not create fundamental error. The appellate court reached this determination by way of an analysis of the Indiana Constitution and Indiana case law. Thus, the state court grounds can not fairly be read to invoke or be intertwined with federal law. Moreover, the grounds relied upon by the appellate court were consistently applied and justified the decision rendered. Accordingly, the state grounds are adequate and independent, precluding federal habeas review absent a showing of cause and prejudice. Wainwright, supra.

Again, Willis can show no cause or prejudice for his procedural default. The law argued in his briefs in support of his habeas petition existed at the

time of his trial. In addition, no prejudice could have resulted, as the jury was instructed that it had no right to make, repeal, disregard, or ignore the law as it existed. Indeed, the jury was fully instructed concerning the elements of the crime and Willis' constitutional rights. The jury also was instructed to look to the trial court's instructions for the law to be applied. (R. 54-88.) Moreover, this Court finds upon review of the prosecutor's closing argument to the jury that it did not suggest that the burden of proof should shift to the defendant. Rather, statements pertaining to a "burden" in the closing argument referenced a shift of responsibility in general rather than a shift of the burden of proof. (R. 649-651.) In sum, Willis cannot show actual prejudice from the prosecutor's argument or from the

instruction as given. For these same reasons, the instruction did not render the trial fundamentally unfair or create fundamental error.

CONCLUSION

For the reasons set forth above, Willis' Petition under 28 U.S.C. § 2254 for Writ of Habeas Corpus by a Person in State Custody is DENIED.

ENTER: 12/4/91

RUDY LOZANO

RUDY LOZANO, Judge
United States District Court

APPENDIX F

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

DAVID A. WILLIS

Plaintiff,

vs. Case No. H91-00147

JAMES E. AIKEN, et al.

Defendants.

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Willis' Petition under 28 U.S.C. § 2554 for Writ of Habeas Corpus by a Person in State Custody is DENIED.

Date: December 6, 1991

RICHARD E.TIMMONS,Clerk
Noel Hernandez
(By) Deputy Clerk